

Supreme Court of the United States

OCTOBER TERM, 1969

No. 190

JAMES TURNER,

Petitioner,

—VS.—

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE THIRD CIRCUIT

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**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY**

DOCKET ENTRIES

<u>Date</u>	<u>Proceedings</u>
7-20-67	Indictment for unlawfully receiving, concealing and facilitating the transportation and concealment of a narcotic drug knowing said drug to have been fraudulently imported into the United States; purchasing, possessing, dispensing and distributing narcotic drug not in or from original stamped package; filed 7-19-67.
7-20-67	Notice of Allocation filed. (Newark)
7-24-67	Ordered defendant remanded to jail. (Coolahan) (7-21-67)
8-22-67	Ordered defendant remanded to jail. (Coolahan) (8-18-67)
8-23-67	Order appointing counsel, filed 8-22-67. (Coolahan)
9- 5-67	Ordered defendant remanded to jail. (Wortendyke) (9-1-67)
9- 6-67	Order for substitution of appointed counsel filed 9-5-67. (Wortendyke)
9-19-67	Plea—Not Guilty. (Wortendyke) (9-15-67)
9-19-67	Ordered defendant remanded to jail. (Wortendyke) (9-15-67)
9-19-67	Defendant's Notice of Motion to suppress evidence filed 9-16-67. (no brief)
9-27-67	Hearing on defendant's motion to suppress evidence. Ordered motion denied. (Wortendyke) (9-26-67)
9-27-67	Trial moved before Hon. Reynier J. Wortendyke, Jr., Judge and Jury. (9-26-67)
9-28-67	Trial continued. (9-27-67) Hearing on defendant's motion for judgment of acquittal. Ordered motion denied. Verdict: Guilty. Ordered defendant remanded to jail.

<u>Date</u>	<u>Proceedings</u>
9-28-67	Question of Jurors filed 9-27-67.
11- 8-67	Information as to prior narcotic conviction filed 11-6-67.
11-15-67	Sentence: Ten years on count 1; five years on count 2 to run concurrently with sentence imposed on count 1; ten years on count 3 to run consecutively to sentence imposed on counts 1 and 2; five years on count 4 to run concurrently with sentence imposed on count 3 but consecutively to sentence imposed on counts 1 and 2. (Wortendyke) (11-14-67)
11-20-67	Judgment and Commitment filed 11-17-67. (Wortendyke)
11-28-67	Notice of Appeal filed 11-27-67.
11-28-67	Copies of Notice of Appeal sent to U.S. Attorney and Clerk, U.S.C.A.
12- 6-67	Copy of Judgment and Commitment with Marshal's return thereon filed.
12-19-67	Copy of Voucher for Compensation and Expenses of Appointed Counsel filed 11-28-67. (Wortendyke)
12-26-67	Record on Appeal sent to U.S.C.A.
2- 8-68	Electronic record of plea filed 2-6-68. (See Env. N-170)
3-15-68	Certified copy of Order of U.S.C.A. granting appellant leave to appeal without prepayment of fees or costs; for docketing appeal and filing record out of time filed 3-14-68.
4- 9-68	Certified copy of Order of U.S.C.A. allowing copy of transcript of all proceedings to be furnished to defendant at expense of U.S.; etc., filed.
6- 6-68	Transcript of hearings held on September 26, 1967, filed.
6- 6-68	Supplemental Record on Appeal forwarded to Clerk, U.S.C.A.

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Case No. 17,181

DATE	FILINGS—PROCEEDINGS
1968	
Mar. 13	<p>[Transferred from Misc. Record No. 887]. Order (<i>Hastie</i>, Chief Judge and Freedman and Van Dusen, Circuit Judges) granting appellant leave to prosecute his appeal without prepayment of fees and costs or without giving security therefor, to file typewritten briefs and appendix and docketing the appeal and filing the record out of time as of the date of this order, filed. Certified copy of above order to Clerk of District Court. Copy of Notice of Appeal, rec'd. November 29, 1967, filed. Record, rec'd. December 27, 1967, filed. (Exhibits G-1 and G-2 contained narcotics—returned to Clerk of District Court on January 9, 1968). CJA Form 11 ORDER (<i>Hastie</i>, Chief Judge and Freedman and Van Dusen, Circuit Judges) appointing Josiah E. Dubois, Jr., Esq. 511 Cooper St., Camden, N.J. as counsel for appellant in this case, filed.</p>
Mar. 19	<p>Appearance of Josiah E. DuBois, Jr.; DuBois, Maiale & DuBois, for appellant, filed.</p>
Mar. 20	<p>Motion by appellant for free transcript of proceedings including a transcript of hearing on motion to suppress evidence and transcript of trial in District Court and to extend time to file brief and appendix to 60 days from receipt of transcript filed. (4 copies). Proof of mailing in letter of 3/19/68.</p>

DATE	FILINGS—PROCEEDINGS
1968	
Apr. 1	Submitted on Appellant's motion for free transcript, etc., and to extend time to file brief and appendix. Coram: Kalodner, Ganey and Van Dusen, Circuit Judges.
Apr. 5	Order (<i>Kalodner, Ganey and Van Dusen</i> , Circuit Judges) directing appellant be provided with copy of the transcript of all proceedings in the court below, the expense to be borne by the U.S. out of funds appropriated for that purpose; and extending the time for filing appellant's brief and appendix to 60 days after the certified transcript is filed as a supplemental record with the Clerk of this Court, filed.
Apr. 5	Certified copy of above order to Clerk of the District Court.
Apr. 5	Certified copies of above order and order granting forma pauperis to Official Court Reporter, Mr. Lee Beal.
Apr. 20	Letter, dated April 29, 1968, from counsel for appellant advising receipt of transcript from Official Court Reporter on April 26, 1968.
June 7	First supplemental record (No. 12-transcript), filed.
June 11	Statement of contents of appendix to brief for appellant, filed. (Proof of mailing attached.) * * * of 6-11-68
June 25	Brief and appendix for appellant, filed. (4 typed copies). Proof of mailing in letter of June 24, 1968.
July 25	Brief and appendix for appellee, filed.
July 27	Proof of mailing of above on July 25, 1968, filed.

DATE	FILINGS—PROCEEDINGS
1968	
Aug. 7	Reply brief for appellant, filed. (4 typed copies). Proof of mailing in letter of August 6, 1968.
Aug. 30	Second supplemental record (No. 13-transcript), filed.
Sept. 24	Argued. Coram: Biggs, Freedman and Van Dusen, Circuit Judges.
Dec. 10	Opinion of the Court (Biggs, Freedman and <i>Van Dusen</i> , Circuit Judges), filed.
Dec. 10	Judgment affirming the judgment of the District Court, filed November 17, 1967, filed.
Dec. 27	Motion by appellant for stay of issuance of the mandate pending the filing of a petition for writ of certiorari, filed. (4 copies).

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,181

UNITED STATES OF AMERICA

vs.

JAMES TURNER, APPELLANT

SUPPLEMENTAL DOCKET ENTRIES

1968

Dec. 30 Certified copy of appendices and proceedings in
this Court to Josiah E. DuBois, Jr., Esquire.

1969

Jan. 2 Order (Biggs, Freedman and Van Dusen, Circuit
Judges) staying issuance of the mandate to
January 30, 1969, filed.

Jan. 2 Certified copy of supplemental proceedings in this
Court to Josiah E. DuBois, Jr., Esquire.

JNE:men
745,466

IN UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 316-67

Title 21 U.S.C., Section 174

Title 26 U.S.C., Sections 4704 (a), 4701, 4703 and 7237 (a)

UNITED STATES OF AMERICA

vs.

JAMES TURNER

INDICTMENT—Filed July 19, 1967

The Grand Jury in and for the District of New Jersey,
sitting at Newark, charges:

COUNT I

That on or about June 1, 1967, at Weehawken, in
the District of New Jersey,

JAMES TURNER

fraudulently, knowingly and unlawfully received, concealed and facilitated the transportation and concealment of a narcotic drug, that is, Heroin Hydrochloride, after the same had been fraudulently, knowingly and unlawfully imported and brought into the United States contrary to law, he, the said James Turner, then and there well knew that the said narcotic drug had been fraudulently, knowingly and unlawfully imported and brought into the United States contrary to law.

In violation of Section 174, U.S.C., Title 21.

COUNT II

That on or about June 1, 1967, at Weehawken, in the
District of New Jersey,

JAMES TURNER

did knowingly, willfully and unlawfully purchase, possess, dispense and distribute a narcotic drug, Heroin Hydro-

chloride, in that the said defendant, James Turner, did purchase, possess, dispense and distribute said drug which was not in or from the original stamped package.

In violation of Sections 4704(a), 4701, 4703, 7237 (a), U.S.C. Title 26.

COUNT III

That on or about June 1, 1967, at Weehawken, in the District of New Jersey,

JAMES TURNER

fraudulently, knowingly and unlawfully received, concealed and facilitated the transportation and concealment of a narcotic drug, that is, Cocaine Hydrochloride, after the same had been fraudulently, knowingly and unlawfully imported and brought into the United States contrary to law, he, the said James Turner, then and there well knew that the said narcotic drug had been fraudulently, knowingly and unlawfully imported and brought into the United States contrary to law.

In violation of Section 174, U.S.C. Title 21.

COUNT IV

That on or about June 1, 1967, at Weehawken, in the District of New Jersey,

JAMES TURNER

did knowingly, wilfully and unlawfully purchase, possess, dispense and distribute a narcotic drug, Cocaine Hydrochloride, in that the said defendant, James Turner, did purchase, possess, dispense and distribute said drug which was not in or from the original stamped package.

In violation of Sections 4704(a), 4701, 4703, 7237 (a), U.S.C. Title 26.

A TRUE BILL.

/s/ [Illegible]
Foreman

/s/ David M. Satz, Jr.
United States Attorney

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

AFTERNOON SESSION—September 27, 1967

(Mr. Schlesinger summed up the case to the Jury in behalf of the defendant).

(Mr. Ellsworth summed up the case to the Jury in behalf of the Government).

COURT'S CHARGE TO THE JURY

THE COURT: Mr. Foreman, ladies and gentlemen, in this case as in every case which is tried to a Jury, the function of the Jury and the function of the Court, although both the functions cooperate to the achievement of the ultimate objective, namely, the doing of substantial justice, are nevertheless distinct and separate. You, or twelve of you, the twelve of you who will deliberate upon this case, will be the sole and exclusive judges of the facts, that is to say, upon you will devolve the responsibility and the sole responsibility of determining what the evidence has been and what evidences you will draw from that evidence, and in resolving those questions you will apply your God given and common sense and the background which each of you has passed through in the way of experience of your respective lives down to the present time. We inherit the jury system from the common law of England and we operate in this Court, and in most of our State Courts, under the Anglo-American law. Centuries of experience of that law, or in that law have proven that the most effective means of ascertaining the truth in litigation in civil or criminal is to call upon the twelve members of the citizenry of the area in which the case is to be tried, select them by lot as you are selected and leave in their hands after the presentation of the evidence by the litigants the resolution and determine, number one, of what that evidence is, what the facts were, actually and, in truth and what inferences are to be drawn therefrom.

The function of the Court, however, in the trial of a case with a Jury is first and foremost to see that justice is done, to see that the appropriate decorum is maintained, to see that only proper and admissible evidence finds its way to the Jury and finally to instruct the Jury upon the principles of law which must govern them in their determination of the facts from the evidence.

You will reach the ultimate and critical phase of the performance of your duties when you retire, when twelve of you retire to deliberate. I am now in the course of performing my last function in the case and that is to say the giving to you of the principles of law which I deem applicable to the evidence in the case.

Now, I've intimated and I repeat that you have the exclusive function of determining what the facts were and what inferences you are going to draw. But you can't do that in a vacuum because you must relate those determinations to the principles of law which must govern your achievement of the ultimate question in this case, and that is the guilt or innocence of the defendant. So you must accept the principles of law as I give them to you, even though you may believe that the law should be otherwise as I state it to be, or even though you may disagree with my statement or statements thereof.

The reason for that is that in every case tried by a combined Jury and Judge there exists an Appellate or Reviewing Court for the purpose of determining whether the Judge was in error in the principles of law which he gave to the Jury, but subject to a general supervisory power which the Trial Judge has, no one is called upon or will be called upon to review your findings on the facts and the ultimate conclusion.

Now, as I indicated, I believe, during the course of your selection, this is commonly referred to as a criminal case. It's a Federal criminal case and it is a Federal criminal case because there are no common law Federal crimes. Crimes in the Federal system—and this is a Federal Court—consist of the violation of the Federal statutes and, as you will see from the indictment in this case, which you will have with you during your deliberations, those particular statutes which underline

the accusations made by the Grand Jury against this defendant are predicated upon certain provisions of the Federal statutory law.

Before we get into specifics, before I undertake to burden you with the provisions of those statutes which are cited in the indictment, there are certain general principles which you must keep constantly in mind, constantly in mind from the time you have taken your oaths when you are impaneled as a Jury until you finally return to this courtroom with a unanimous verdict respecting each of the separate counts of the indictment, namely, a verdict of guilty or not guilty, not guilty or guilty. I purposely vary the alternative sequence of the possibilities upon the evidence in the case.

In the first place, your verdict must be unanimous. It must be an expression of the combined judgment of all twelve of you. Now, that doesn't mean that any single Juror or minority of Jurors should abdicate or cast aside or disregard his or their personal convictions respecting particular conclusions to be drawn from the evidence. Each of you has a God given mind and a background of common sense and it is the combination of all twelve Jurors which the law believes will result in a unified conviction on your parts of either the guilt or innocence of the defendant.

The reason why you will be locked up in a room by yourselves out of the hearing of everyone else and free of any possible contact from anybody else or with anybody else is so that you may really discuss and debate and deliberate upon the evidence which has been presented, considering in the light thereof the principles of law which the Court is endeavoring to give to you and then come out with a unanimous verdict.

As I said a moment ago, the desirability of having a unanimous verdict, which unanimous verdict will be the only way that the case may be disposed of, when I say unanimous I mean unanimous for either not guilty or guilty, is because if you don't have a unanimous verdict then the case, the trial of the case has been a waste of time and the case will have to be tried over again. Not only must your verdict be unanimous, ladies and

gentlemen, but you must constantly bear in mind—and I am sure you have continuously borne in mind since you took your oath—that this being a criminal case the burden is cast upon the Government which prosecutes the case in the name of all of the American people against the defendant to satisfy the Jury by the evidence beyond a reasonable doubt of the guilt of the defendant of the particular offense which the Jury is considering. I will mention in a moment the fact that there are several separate defenses charged in this indictment and I will endeavor to explain them to you.

The reason why, and I intimated this during the course of the selection of the Jury, the burden is cast upon the Government here of satisfying the Jury as the triers of the fact of the guilt of the defendant beyond a reasonable doubt is because from the moment which this or any other defendant in a criminal case pleads not guilty to an offense charged in the indictment, or an information, if it happens to be a case rendering an information appropriate, there figuratively speaking surrounds this defendant with a cloak, as it were, consisting of what we call the presumption of innocence. That simply means this: that having been accused by the Government through the Grand Jury of having committed certain offenses and having denied his guilt of those offenses he is presumed to be innocent and that presumption continues to surround him until the twelve members of the Jury through their foreman, having reached an unanimous verdict, return to the courtroom and announce that the Jury finds the defendant guilty of the particular offense under consideration. That is why the burden is cast upon the Government of satisfying the Jury by the evidence beyond a reasonable doubt.

What do we mean by the phrase beyond a reasonable doubt? For almost thirteen years I have been endeavoring to define the term "reasonable doubt" in a criminal case to numerous Juries and I am still not happy with the type of language used by the higher Courts for the guidance of subordinate Courts such as I am in the definition of reasonable doubt. But I am going to give it to you. It's all in English and I think we all understand

it. I am sure you know what the Courts mean when I give you this language. Hence, I am going to read to you.

"The term reasonable doubt is a term which is fairly well understood but not easily defined." That is a sort of a lame way to start a definition. But I continue: In fact, the Courts have experienced considerable difficulty with framing an adequate definition. It describes that state of mind which arises when, after a careful and impartial consideration of all the evidence and the inferences of which the evidence is reasonably susceptible, you, the members of the Jury cannot say that you have an abiding conviction to a moral certainty of the truth of the charge which you are considering. Reasonable doubt, however, is not a mere possible or imaginary doubt because everything relating to human affairs and depending upon oral evidence is open to some possible or imaginary doubt. The term reasonable doubt may be simply defined as a conscientious misgiving engendered in the mind either by the evidence or by the lack of evidence.

So, as I have already indicated in the application of these principles of law in the immediate case if, after a consideration of all the evidence and the inferences of which such evidence is reasonably susceptible, you are not convinced beyond a reasonable doubt of the guilt of the defendant of the particular offense which you are considering, you will return a verdict in defendant's favor, a verdict of not guilty. However, if after such a consideration of all the evidence and the inferences of which such evidence is reasonably susceptible you are convinced beyond a reasonable doubt of the guilt of the defendant of the particular offense which you are considering, you may, as the sole judges of the issues of fact and in the exercise of your conscientious judgment, return a verdict of guilty against the defendant of the particular offense which you are considering.

As I have intimated already, and I will not advert to that subject again, when you have reached the ultimate conclusion unanimously respecting the question of guilt or innocence with respect to the particular offense under consideration, you will consider and bear in mind in the

light of your determination of the evidence and the inferences to be drawn therefrom the principles of the statutory provisions upon which the offenses charged in this indictment are predicated. The reading of legislative enactments, whether they be Federal or State, is frequently very difficult to follow. It is usually quite monotonous. But when you boil it down to the essentials, the elements of the offenses stated in each of these statutory provisions, I believe you will have no difficulty in bearing them in mind.

As a matter of interest, we are calling upon two portions of the United States Code. The United States Code is the embodiment of the laws of the United States enacted by the Congress. Fortunately for us lawyers and Judges they are kept up to date so that we may keep abreast of the changes as they occur. The first statutory provision which is invoked in the indictment of this case is a section in what we call the Food and Drug Act. You have all heard of them and you know that we have a Federal Department charged with responsibility of supervising production and sale and use of food, drugs and I believe even the cosmetics in this country. The purpose of their function is to serve as far as possible the health and wealth of the people of the United States.

The first count of the indictment, that is to say, the first separate offense which is charged in this indictment—where is the indictment, Miss Costello? You will have it with you, ladies and gentlemen—charges that on or about June 1, 1967 at Weehawken, New Jersey—that is over here in Hudson County on the banks of the Hudson, and that location is in what we call the District of New Jersey which is coterminous with the State of New Jersey—James Turner, this defendant fraudulently, knowingly and unlawfully received, concealed and facilitated the transportation and concealment of a narcotic drug, that is, heroin hydrochloride. I charge you ladies and gentlemen of the Jury that heroin hydrochloride is a narcotic drug and the term is used in the statutory sections to which I am drawing your attention. This offense proceeds, or this charge of offense proceeds to allege that this reception, concealment and facilitation of the trans-

portation of this drug was after it had been fraudulently and unknowingly and unlawfully imported and brought into the United States contrary to law and that he, the said James Turner, the defendant here, then and there, that is to say while it was in his possession, well knew that the said narcotic drug had been fraudulently, knowingly and unlawfully imported and brought into the United States contrary to law and that offense is charged to have been a violation of Section 174 of Title 21 of the United States Code. That is to say what is commonly known as the Food and Drug Act.

Now, the specific language of that section insofar as I deem it relevant to the evidence presented in this case provides in the pertinent part as follows: "Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction contrary to law, or receives, conceals, buys, sells or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of these acts shall be guilty of the offense prescribed by the section."

Well, you may immediately say to yourselves in your mind what does the statute mean when it says in order to be guilty of a violation of this section the defendant must have knowingly brought or transported or had possession or concealed this drug knowing that it has been imported or brought into the United States contrary to law. Well, that question is a natural question for you to raise in your mind, but it is immediately answered in the following language in the very same section.

"Whenever," says the statute, "on trial for a violation of this section the defendant is shown to have or to have had possession of a narcotic drug, such possession shall be deemed sufficient evidence," that is the bare possession, sufficient evidence "to authorize conviction unless the defendant explains the possession to the satisfaction of the Jury."

Now, obviously there is no evidence in this case that this particular defendant knew that this cocaine and this

heroin had been imported in the United States contrary to law. The statute recognizing the impossibility of proving knowledge in these cases, and having in mind the welfare of the people which is the purpose of the Food and Drug Act, says that all you have to do, all the Government has to do is to show that there was possession of this drug by the defendant on trial and that evidence shall suffice to authorize conviction of violation of the statute, unless by the witnesses presented the possession of the drugs by this defendant under those circumstances was satisfactorily explained to the Jury. I charge you that there is no such evidence as that called for by the portion of the section which I have just completed reading.

I believe in an overabundance of caution, in view of the reference made by counsel for the defendant in his summation, the burden of proof cast upon the Government to prove all of the essential elements of the offense charged here does not require that any evidence, even though there is this presumption clause of the statute to be presented by the defendant. In other words, you must be satisfied by the totality of the evidence irrespective of the source from which it comes of the guilt of the defendant of the offense proscribed by the section which I read to you in order to find the defendant guilty of a violation of that section.

Now, I will not attempt in connection with each of these charged offenses to review the evidence, as counsel has well said or have well said the case has taken fortunately, a relatively short period of time to try. The evidence must be very fresh in the minds of all of you. You will recall, however, that the Government witnesses—and in referring to their testimony I do not give any greater credence to the evidence of any witness in the case, that is for you to determine, than to any other—have testified as to the circumstances under which this defendant, according to the Government's contention, was found to have in his possession under the front seat, which he had shortly before occupied in the automobile which had transported him through the Lincoln Tunnel to its exit in New Jersey, these particular quantities of

cocaine and heroin. In addition to finding this material or some of this material under the seat of the car, there is testimony to the effect that during the process of searching the occupants of the car, but before the actual personal search of this defendant had been commenced, a small package was seen to be thrown by this defendant with one of his hands on to the top of a wall in the vicinity of the exit from the top, and you may consider, if you believe that testimony, whether or not that act on the part of this particular defendant constituted evidence that this material was in his possession and had been transported by him from the State of New York to the State of New Jersey.

So you will consider all of the evidence, the provisions of the statute and the charge in the indictment under the first count, namely, the charge of the violation of Section 174 of Title 21. If you are convinced beyond a reasonable doubt in the light of the evidence and the provisions of the statute and the law as given you by the Court that the defendant here was guilty of that offense, you may return a verdict on the first count of guilty. Unless you are unanimously convinced by the evidence beyond a reasonable doubt of that guilt you will return a verdict under the first count of the indictment of not guilty in favor of the defendant.

Now, the third count is in all respects similar to the first count except that the substance which was involved in the alleged transportation or possession is different. Under count one we had cocaine and that is a narcotic drug. That is prohibited by Section 184 and under the third count we have heroin which I charge you is also a narcotic drug and falls within the category contemplated by Section 174 of Title 21. Therefore, if in the light of all the evidence as you find it to be, and the inferences which you have determined to draw therefrom, and under the language of the statute and the instructions of the Court you are convinced beyond a reasonable doubt that the defendant here was guilty of a violation of that section, you may return a verdict of guilty of the offense charged therein. On the other hand, unless you are so convinced unanimously beyond a rea-

sonable doubt your verdict must be a verdict of not guilty in favor of the defendant.

The other two counts of the indictment, ladies and gentlemen, are under an entirely unrelated set of statutes. I say unrelated, they are related by their terms but they are separately designated. They are what we all run into these days on April 15 and shortly before, the Internal Revenue laws. I assume you have heard of them. But they also proscribe certain excise taxes on various substances, including narcotic drugs. Counts two and four, which I will deal with together, but you will consider separately in the light of the evidence, allege that on June 1, 1967 at Weehawken in the District of New Jersey the same defendant, James Turner, did knowingly, willfully and unlawfully purchase, possess, dispense and distribute a narcotic drug under the second count heroin hydrochloride, under the fourth count cocaine hydrochloride, in that the said defendant James Turner did purchase, possess, dispense and distribute said drug which was not in or from the original stamped package. That is predicated upon the provisions of certain sections of Title 26 of the United States Code which embodies the Internal Revenue laws, and for your information your attention is directed to two sections of that Title 26, Sections 4704 and 4703, which I will read to you.

"It shall be unlawful for any person to purchase, sell, dispense or distribute narcotic drugs except in the original stamped packages or from the original stamped package, and the absence of appropriate tax paid stamps from narcotic drugs shall be prima facie evidence of a violation of this sub-section by the person in whose possession they may be found."

Now, the testimony presented by the Government here is uncontradicted that none of the material which was seized by the Treasury agents was either in or appeared to be taken from a package bearing the stamps required by the Internal Revenue laws. That requirement is in the preceding section to that which I read you, which requires that the stamps required by a later section for narcotic drugs shall be so affixed to the bottle or other

container as to securely seal the stopper covering or wrapper thereof and the later section, which deals directly with narcotic drugs as the subject of excise taxes, requires that the stamps imposed by two other sections of the same Title shall be obtained or provided by the Secretary of the Treasury or his delegate and shall be applicable to narcotic drugs and marijuana.

We are not concerned with marijuana here. With respect to my previous instruction that the substance which was seized from each of the packages by the Treasury Department agents on the occasion referred to in the indictment here were narcotic drugs is to be found in Section 4731 of Title 26 which defines narcotic drugs, and included in which definitions are the substances which the witnesses, which the Government chemist found to be contained in these packages. I don't think you are going to have any difficulty with counts two and four, ladies and gentlemen, because they charge violations of the Internal Revenue laws and the evidence in this case stands uncontradicted that the substances which were received by the Treasury agents in this case were not from the original stamped package and the packages thereof so seized bore no stamps as required by the statute.

So that in effect your problem, your principal problem here will be to determine whether or not certain quantities of heroin hydrochloride and cocaine hydrochloride which have been marked in evidence in this case were in the possession or under the control or both of the defendant in this case, James Turner, on June 1, 1967 when they were seized by United States Treasury agents at Weehawken in the District of New Jersey.

Now, I need not expatiate upon the principles which should govern your determination of the credibility of any of the witnesses. The reason we have a Jury is because they and they to the exclusion of every other instrumentality which might be conceived of for that purpose are the most effective means of finding out whether a person who takes an oath and sits on this witness stand is telling the truth. You may consider the interest of the witness in the outcome of the case, the

readiness and directness in which he responds to the questions put to him, the probability that he was in a position to know or observe, become aware of the facts which he undertakes to state, the existence or nonexistence of any motive on the part of the witness to depart from the truth. Whether or not as you observe the witness and listen to his story you would be inclined to take action or refrain from taking action based upon the story which he gives, and a variety of other considerations which I will not take the time to enumerate. But which will occur to your respective minds automatically.

Now, the Court, and I know the Jury, have cooperated and the Jury will continue to cooperate to accord a fair trial to this defendant. The Jury will keep constantly in mind during the course of its deliberations the burden which is cast upon the Government and which the Government accepts of satisfying the Jury beyond a reasonable doubt of the Government's contentions of guilt respecting the offenses charged in the indictment. You will also bear in mind that your verdict must be unanimous and each of you, I am sure, will give to his or her colleagues the benefit of his or her views respecting the evidence and the inferences to be drawn therefrom.

You will take successively each of the counts of the indictment because each count of the indictment charges a separate offense, therefore, you will be prepared through your foreman to announce four verdicts when you return to the courtroom. On count one when the clerk inquires of you you will say we find the defendant guilty or not guilty, as the case may be. On count one. On count two you will announce we find the defendant guilty or not guilty on count two. On count three you will announce we find the defendant guilty or not guilty on count three. On count four we find the defendant guilty or not guilty on count four.

The fact that your foreman will speak for the entire Jury will justify the Court and the clerk to assume that your verdict is unanimous. Of course, if counsel for the defendant desires to assure himself by asking that you be polled, that is to say, asking each one of you separately whether you concur in the foreman's verdict as

announced, that opportunity will be accorded to defense counsel. Now, in accord with the rules governing the trial of cases in this Court the Court is in receipt of written requests from the Government, no requests having been received from the defendant, to charge the following principles of law. I may or may not have already included the substance of each of these requests in my general charge to you. If I have, and if any of the questions which I will now charge may be repetitious of the substance of what I have said, you are not to attach to that fact, if you find it to be a fact, any impression that the Court considers the particular principles any more important in the case than any other principles of law which it has endeavored to give to you.

I charge the Government's requests as follows:

"Request to charge as to Count I wherein the defendant was charged with violating Title 21, United States Code, Section 174.

"Possession" of drugs within meaning of this section providing that unexplained possession of narcotics authorizes conviction can exist without physical contact so long as defendant has dominion and control over drug."

I so charge you.

"As to Counts I and III of the indictment charging the defendant with violation of Title 21, United States Code Section 174 "presumption" under this section relieves the Government from proving importation."

I so charge you.

"Constructive possession is enough to bring the presumption into play under this section providing that where defendant on trial for violation of this section is shown to have had possession of the narcotic drug such possession shall be deemed sufficient evidence to authorize conviction unless defendant explains it to satisfaction of the jury"

I so charge you.

"As to Counts II and IV of the indictment, they charge the defendant with violation of Title 26, United States Code Section 4704(a). One possessing, selling, or purchasing narcotics from package not stamped is guilty of offense.

I will add offense proscribed by that section.
I so charge you.

The Court will now hear in the presence of but out of the hearing of the Jury any objections from counsel respecting the Court's charge, either the main charge or the charge of the requests.

(Whereupon the following was had at side Bar.)

MR. SCHLESINGER: I believe, your Honor, in your charge there was the implication that the cocaine was part of the first count in the indictment. Actually I think the evidence shows that the cocaine, that is the item thrown up over the wall and the heroin was the item underneath the seat. I think the degree of possession is different.

THE COURT: I was aware of that. I believe I took care of it.

MR. ELLSWORTH: That is a factual question.

THE COURT: Lest there be any question I will expatiate on it. Anything else?

MR. SCHLESINGER: No.

(Whereupon the following was had in open court.)

THE COURT: I may have been confused with respect to where the cocaine was and where the heroin was, whether one was under the seat and the other on the wall. You heard the evidence and you will have the indictment with you so you will be able to tell. Therefore, if I have erroneously stated in my main charge that the heroin was where the cocaine should have been, or vice versa, you will disregard that.

(Alternate Jurors 13 and 14 excused.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Criminal No. 316-67

UNITED STATES OF AMERICA

v.

JAMES TURNER

JUDGMENT AND COMMITMENT—Filed November 17, 1967

On this 14th day of November, 1967 came the attorney for the government and the defendant appeared in person and¹ by counsel

IT IS ADJUDGED that the defendant has been convicted upon his plea of² not guilty, and a verdict of guilty of the offense of unlawfully receiving, concealing and facilitating transportation and concealment of narcotic drug knowing said drug to have been fraudulently imported into the United States; purchasing, possessing, dispensing and distributing narcotic drug not in or from original stamped package

as charged³

and the court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

IT IS ADJUDGED that the defendant is guilty as charged and convicted.

IT IS ADJUDGED that the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of⁴ ten (10) years on Count 1; five (5) years on Count 2, to run concurrently with sentence imposed on Count 1; ten (10) years on Count 3, to run consecutively to sentence imposed on Counts 1 and 2; five (5) years on

Count 4, to run concurrently with sentence imposed on Count 3, but consecutively to sentence imposed on Counts 1 and 2.

IT IS ORDERED that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualified officer and that the copy serve as the commitment of the defendant.

/s/ Reynier J. Wortendyke
United States District Judge

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17181

UNITED STATES OF AMERICA

v.

JAMES TURNER, APPELLANT

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Argued September 24, 1968
Before BIGGS, FREEDMAN and VAN DUSEN, *Circuit Judges*

OPINION OF THE COURT—December 10, 1968

By VAN DUSEN, *Circuit Judge*.

Appellant, James Turner, was tried and convicted by a jury for violation of 21 U. S. C. § 174¹ and 26 U. S. C. § 4704(a).² The Government adduced testimony by agents of the Federal Bureau of Narcotics that Turner threw

¹ Appellant was charged in Counts I and III with having "fraudulently, knowingly and unlawfully received, concealed and facilitated the transportation and concealment of a narcotic drug, . . . after the same had been fraudulently, knowingly and unlawfully imported and brought into the United States contrary to law . . ." in violation of 21 U.S.C. § 174.

² Also, appellant was charged in Counts II and IV with knowingly, wilfully and unlawfully purchasing, possessing, dispensing, and distributing a narcotic drug, in that he did purchase, possess, dispense, and distribute the drug, not in or from the original stamped package, in violation of 26 U.S.C. § 4704(a).

away a tinfoil package containing cocaine hydrochloride after leaving his car and while in the custody of the police. During a search of appellant's vehicle, the agents discovered certain glassine envelopes which later were determined to contain heroin hydrochloride. None of the containers was affixed with the requisite tax stamps. The Government offered no evidence which would tend to show that the drugs possessed by the defendant were illegally imported into the United States; that the defendant had knowledge that the drugs were illegally imported; or that he did not purchase the drugs in or from their original stamped package. Instead, the case went to the jury on the presumptions embodied in Sections 174³ and 4704(a).⁴

The sole question before us is whether the presumptions contained in 21 U. S. C. § 174 and 26 U. S. C. 4704(a) are violative of the Fifth Amendment's guarantee against self-incrimination. Appellant contends that, although both of these sections heretofore have been held constitutional,⁵ the recent cases of *Griffin v. California*, 380 U. S. 609 (1965), and *United States v. Jackson*, 390

³ "Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury."

⁴ "(a) General Requirement.—It shall be unlawful for any person to purchase, sell, dispense, or distribute narcotic drugs except in the original stamped package or from the original stamped package; and the absence of appropriate taxpaid stamps from narcotic drugs shall be prima facie evidence of a violation of this section by the person in whose possession the same may be found."

⁵ The presumption in 21 U.S.C. § 174 was held valid in *Yee Hem v. United States*, 268 U.S. 178, 185 (1925), and repeatedly thereafter in the Circuits. E.g., *United States v. Arnone*, 363 F.2d 385, 391-2 (2nd Cir), cert. den. 385 U.S. 957 (1966); *Bradford v. United States*, 271 F.2d 58, 61 (9th Cir. 1959); *United States v. Brown*, 207 F.2d 310, 312 (7th Cir. 1953); *Dear Check Quong v. United States*, 160 F.2d 251, 252 (D.C. Cir. 1947). The constitutionality of 26 U.S.C. § 4704(a) was upheld in *Goode v. United States*, 149 F.2d 377 (D.C. Cir. 1947).

U. S. 570 (1968), compel a ruling that the presumptions violate defendant's Fifth Amendment privilege.

Griffin decided that comment by the court on an accused's failure to testify constitutes a "penalty imposed by courts for exercising a constitutional privilege,"⁶ and held that such comment violates the self-incrimination clause of the Fifth Amendment. The court there pointed out that where a defendant fails to take the stand, although an inference could be drawn that he is guilty of the crime being tried, an alternative inference might be drawn that he has prior convictions, since to testify would enable the prosecution to introduce any such convictions for impeachment purposes (pp. 614-15). *Jackson* held the death penalty clause of the Federal Kidnapping Act unconstitutional since it discouraged the assertion of the right to demand a jury trial and the right to plead not guilty. Appellant's theory is that the statutory language, when used in instructions to the jury, is the substantial equivalent of unfavorable comment prohibited by *Griffin* and discourages the right of a defendant to remain silent just as the death penalty provision, struck down in *Jackson*, was held to discourage a plea of not guilty and the demand for a jury trial.

The presumptions provided by 21 U. S. C. § 174 and 26 U. S. C. § 4704(a) shift the burden of going forward with evidence once the Government has established possession (cf. *Roviaro v. United States*, 353 U. S. 53, 63 (1957))⁷ and do not violate the self-incrimination clause

⁶ *Griffin v. California*, 380 U.S. 609, 614 (1965).

⁷ In the *Yee Hem* case, *supra*, the court said at pages 184-5:

"Every accused person, of course, enters upon his trial clothed with the presumption of innocence. But that presumption may be overcome, not only by direct proof, but, in many cases, when the facts standing alone are not enough, by the additional weight of a countervailing legislative presumption. . . .

"... The statute compels nothing. It does no more than to make possession of the prohibited article *prima facie* evidence of guilt. It leaves the accused entirely free to testify or not as he chooses."

(Continuing with the language quoted below at page 4.)

of the Fifth Amendment. *Griffin* and *Jackson* are not controlling because the language of §§ 174 and 4704(a) neither constitutes unfavorable comment on the accused's failure to testify, nor does it have an "unnecessary and therefore excessive" chilling effect on the exercise of that privilege, see *Jackson, supra*, at 582.

Any support which defendant may secure from *Griffin* in this situation must be substantially reduced by the Supreme Court's decision in *United States v. Gainey*, 380 U. S. 63 (1965), decided less than two months before *Griffin*, and which upheld the constitutionality of 26 U. S. C. § 5601(b)(2),^{*} containing a presumption similar to those here. In *United States v. Armone, supra*, the Second Circuit specifically held that a charge under § 174 was not an adverse comment on the defendant's failure to take the stand, depriving him of his Fifth Amendment privilege.

Gainey does not require reversal as long as there is "neither allusion nor innuendo based on the defendant's decision not to take the stand."^{*} That ground is absent here since the trial court specifically charged that "the burden of proof cast upon the government to prove all of the essential elements of the offense charged here does not require that any evidence, *even though there is this presumption clause of the statute*, be presented by the defendant" (emphasis supplied).¹⁰

^{*} Under 26 U.S.C. § 5601(b)(2) the jury can infer guilt of the crime of illegally carrying on the business of a distiller without bond merely from evidence of the defendant's presence at the site of the still.

^{*} 380 U.S. 63, 71.

¹⁰ The court also charged that the jury might (not that it must) return a verdict of guilty if it was convinced beyond a reasonable doubt, using this language:

"Therefore, if in the light of all the evidence as you find it to be, and the inferences which you have determined to draw therefrom, and under the language of the statute and the instructions of the Court you are convinced beyond a reasonable doubt that the defendant here was guilty of a violation of that section, you may return a verdict of guilty of the offense

Appellant claims that his exercise of the privilege against self-incrimination was discouraged by the presumption in question and he is therefore entitled to reversal under the *Jackson* doctrine. We do not agree. If the exercise of the privilege is discouraged, it is because the

"... accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a *prima facie* case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution."¹¹

For the foregoing reasons, the judgment of conviction will be affirmed.

charged therein. On the other hand, unless you are so convinced unanimously beyond a reasonable doubt your verdict must be a verdict of not guilty in favor of the defendant."

¹¹ *Yee Hem v. United States*, 268 U.S. 178, 185 (1925).

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 17,181

UNITED STATES OF AMERICA

vs.

JAMES TURNER, APPELLANT

(D. C. Criminal No. 316-67)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Present: BIGGS, FREEDMAN and VAN DUSEN,
Circuit Judges

JUDGMENT—December 10, 1968

This cause came on to be heard on the record from the United States District Court for the District of New Jersey and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed November 17, 1967, be, and the same is hereby affirmed.

ATTEST:

THOMAS F. QUINN
Clerk

SUPREME COURT OF THE UNITED STATES

No. 1387 Misc., October Term, 1968

JAMES TURNER, PETITIONER

v.

UNITED STATES

On petition for writ of Certiorari to the United States Court of Appeals for the Third Circuit.

On consideration of the motion for leave to proceed herein *in forma pauperis* and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed *in forma pauperis* be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1474 and placed on the summary calendar and set for oral argument immediately following No. 1473.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 2, 1969